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IS THE LAW MALE?: THE ROLE OF EXPERTS

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We have been asked in this Symposium to address the question, "Is the law male?" This question, or the answering of it, requires us tacitly to acknowledge that human activities and institutions can be gendered just as people are gendered—in other words, to apprehend that "gender" is a construct rather than a biological fact.¹ Once we have accepted this premise, we also discover that engendering² is a transformative process that can be ongoing and ever-changing. This Symposium is part of that process.

Rather than prejudge the answer to our ultimate question and thus truncate the transformation entailed in fully addressing it,³ I propose to address a narrower, but nonetheless relevant, question: Does the law reflect gender bias? The answer is generally yes, and the bias is primarily male. What can we do to address that bias or the processes by which it operates in law? Let me point to evolving solutions that use research on social cognition and sex stereotyping to analyze the dynamics of sex discrimination.

We have learned several things about engendering from social science research. We have learned that biased conduct may prevail even where well-meaning people are involved. We have learned that it is possible to eliminate that bias, albeit with some difficulty. We have learned that we cannot necessarily trust our perceptions—that inequality may appear fair and fairness may be seen as favoritism. Finally we have learned that, if equality is our goal, it is important not only to change behavior at critical junctures involving the distribution of resources and opportunities, but also, ultimately, to change perception.⁴

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1. See Sarah E. Burns, *Apologia for the Status Quo*, 74 GEO. L.J. 1791 (1986) (reviewing DAVID L. KIRP ET AL., *GENDER JUSTICE* (1986)).

2. This usage is borrowed from Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

3. As one example of the work of transforming the law, see Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991), in which the author explores advantages of "feminine" problem-solving styles in some lawyering contexts.

4. See generally SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (2d ed. 1991).

This learning is grounded in a range of research concerning the way in which categorizing according to sex- and race-based characteristics affects our perceptions, memories, inferences, and social and task group interactions. Our learning is amplified by the research on the social and cultural meanings assigned to—the “stereotypes about”—our sex and race. The effects of stereotyping are compounded by the tendencies to in-group preference.

As a result of this learning we are able to call upon the expertise of social scientists to help us identify and change bias and stereotyping. This enterprise marks an important purpose for which we have used expert testimony in the courtroom. The most prominent example was in the Title VII case of *Price Waterhouse v. Hopkins*,⁵ in which a female senior associate challenged the “Big Six” accounting firm’s denial of partnership to her. The plaintiff, the only female candidate, had brought in more money and business than the other eighty or more male partnership candidates.⁶ She was passed over for partnership selection with the advice that she might succeed with a later try if she presented a more feminine image.⁷

Expert witness Dr. Susan Fiske testified about the evidence of stereotyping, concluding that the denial of partnership to the plaintiff was partially the result of sex stereotyping and thus to some extent based upon the plaintiff’s sex.⁸ The trial court accepted this conclusion, as well as the defendant’s arguments that the plaintiff had an abrasive personality,⁹ which occasioned the court’s use of the mixed motive proof scheme that took the case to the Supreme Court. In preparing their brief of amicus curiae in support of Hopkins’s position for the Supreme Court, the American Psychological Association surveyed the research literature pertinent to the expert testimony in that case. They specifically located over 12,000 relevant studies.¹⁰

When experts clarify how bias affected the events at issue in a case, they also educate the trier of fact as to the selfsame problems potentially present in the court’s own decision making.¹¹ In this respect, it may be more important for the expert to testify as to what the

5. 490 U.S. 228 (1989).

6. See *Price Waterhouse v. Hopkins*, 618 F. Supp. 1109, 1112 (D.D.C. 1985).

7. See *id.* at 1117.

8. *Id.*

9. *Id.* at 1120.

10. Brief of Amicus Curiae American Psychological Association in Support of Respondent at 7-8 & nn. 6-8, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167).

11. I refer the reader to the extensive work of Lynn Hecht Schafran on gender bias in the courts and the now-numerous studies on gender bias in court systems. See, e.g., Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI-KENT L. REV. 397 (1993).

research establishes rather than offer any conclusion as to an ultimate fact-law determination in the case. Presented in this manner, expert testimony can be helpful even if we encounter some objection to its use on the grounds that the expert's conclusions might usurp jury decision making.

Perhaps it would be helpful to provide an example of a bias expert educating a trier of fact concerning the dynamics of bias to explain the events at issue in a case and the perceptions of witnesses concerning them. In the Title VII action litigated by NOW Legal Defense and Education Fund, *Robinson v. Jacksonville Shipyards*,¹² a female first-class welder sued her employer, Jacksonville Shipyards, for maintaining a sexually hostile work environment. She claimed that the presence of sexual pictures of women prominently displayed in offices, shops, and other common places; other verbal and physical sexual conduct; and the employer's practice of condoning these activities made the workplace sexually hostile to her and other female employees.¹³

In an effort to explain the dynamics of stereotyping in the workplace, plaintiff offered expert testimony, by Dr. Fiske, that the conditions at the shipyards presented classic problems of stereotyping.¹⁴ Based upon a variety of factors including the rarity of women, the presence of sexually-based priming in the form of verbal harassment and displaying of sexual pictures of women, a power hierarchy in which women were at the bottom, and the absence of a professional norm of conduct such as an effective sexual harassment policy, the expert concluded that a number of effects of stereotyping could be expected to appear.¹⁵ The perceptions of the men—and some of the women—about women would be organized along the lines of stereotypes about females. Because females were represented in such small numbers and thus highly visible, there would be heightened attention to them and sex-based explanations of their activities; yet similarly close observation of men and sex-based explanations of their behavior would not occur.¹⁶ As a result of these dynamics, and the effects of the fact that women constituted an out-group, the managers would also tend to trivialize the concerns or complaints of the women, ex-

12. 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655, (11th Cir. argued Dec. 2, 1992) (supplemental briefing submitted Jan. 18, 1994).

13. *Id.* at 1490.

14. *Id.* at 1503.

15. *Id.* at 1503-05.

16. *Id.* at 1504.

plaining those concerns away based on sex stereotypes about women.¹⁷ All of these conclusions were solidly founded on research that is, in scientific terms, well established as to both internal and external validity and peer review acceptance.

From the conditions in the workplace, and the learning on social cognition, a number of things could be predicted. The women would regularly be talked about in terms of their sex, and because the workplace was sexualized, in terms of their sexuality.¹⁸ Thus an incident in which a male worker exposed his genitals to a female worker would lead not to concern about the wrongness of the man's behavior and an effort to remedy it, but to the concern that disciplining the man would hurt his job status and to rationalizations that the woman ought to expect such things. It also prompted speculation about whether she "really liked" being subjected to the exposure and, if she did not whether she was frigid.¹⁹ In such a circumstance, women would naturally be reluctant to complain or in any other way call more attention to themselves than they already suffered simply by being women in that setting. The evidence in the case confirmed the predictions.

The expert's testimony explained the sex-based nature of this conduct. It also put into perspective the assessment by the employer, its supervisors, and employees that a woman was being hysterical and overreacting when she had reported sexual harassment problems. As one part of the employer's defense, the employer²⁰ argued that the women participated in the atmosphere, and were no more harmed by it than were the men.²¹ Defendants also sought to show that women had no serious complaints about their work environment and that whatever complaints were made had been adequately remedied. To establish these points the defendants sought to show, among other things, that one of the plaintiff's key witnesses participated in making the workplace hostile and had not objected to it. That witness, another woman worker, testified that she was bothered by the sexual pictures of women in the workplace because she found that the men behaved in a sexualized manner in the presence of the pictures²² even

17. *Id.* at 1502-05.

18. *Id.* at 1503.

19. *Id.* at 1504.

20. The defendants included the company and a number of supervisory agents of the company.

21. *Robinson*, 760 F. Supp. at 1499.

22. *Id.* at 1500. Her view was buttressed by research that established that 50% of men exposed to soft core pornography responded by perceiving and treating in a sexual manner women with whom they interacted after the exposure. *Id.* at 1503 (citing Doug McKenzie-Mohr &

though she was not concerned about the content of the sexual pictures in themselves.²³ As a result of her perception that the men behaved differently around the pictures, she stayed as much as possible away from the places where the pictures were located and avoided the men associated with those places.²⁴ Her job, however, required her to have frequent contact with most shops and trades.²⁵

Defendants sought to discredit this witness by showing that she had the "foulest mouth" in the shipyards. When questioned about her specific word choices some witnesses reported that she had used a phrase like "motherfucker."²⁶ One of the defendant's witnesses testified that he had worked around that female employee on occasions and asserted that she had used "crude" language. In fact he testified on cross examination that she had said, "Hell. I don't care what I say. Screw you all. I say what I want to say. The hell with it."²⁷ It was this language that had prompted his telling her, as he reported in his direct examination, that, "[y]ou should be ashamed of yourself. It's not respectable for a lady to be saying things like that."²⁸ Cross-examination probed his own use of crude language and the fact that he and others unashamedly used that and much worse language in the shipyards.²⁹ He defended himself with the argument, "[w]ell, it seems more nicer coming from a man than it does coming from a lady, yes."³⁰

The expert testimony explained how, in an atmosphere in which gross sexual expression is commonplace for men whose use of it goes unchecked, a woman is negatively-judged when she may resort even to the most benign versions of the common parlance.³¹ On the basis

Marla P. Zanna, *Treating Women as Sex Objects: Look to the (Gender Schematic) Male Who Has Viewed Pornography*, 16 PERS. & SOC. PSYCH. BULL. 296 (1990)).

23. *Robinson*, 760 F. Supp. at 1500.

24. *Id.*

25. *See id.* ("Banks [the witness] observed pictures of nude and partially nude women throughout the workplace.") (emphasis added).

26. 7 Trial Transcript at 100-02, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (No. 86-927) [hereinafter *Robinson Trial Transcript*] (testimony of Herbert Kennedy). Other testimony offered by the plaintiff showed that the circumstances of her use of this language were often ones in which she had been provoked by the harassment or abuse of a male coworker. *E.g.* 3 *Robinson Trial Transcript*, *supra*, at 42-48, 52-68. Testimony also showed "motherfucker" to be a pallid epithet compared to the customary language of the shipyards. *See Robinson*, 760 F. Supp. at 1498-1501.

27. 7 *Robinson Trial Transcript*, *supra* note 26, at 160 (testimony of George Livingston).

28. *Id.* at 159.

29. *Id.* at 161.

30. *Id.*

31. *See* 4 *Robinson Trial Transcript*, *supra* note 26, at 171-202; 5 *Robinson Trial Transcript*, *supra* note 26, at 3-43.

of this and other testimony showing sexual abuse and a dual standard based upon sex, the trial court concluded that the employer maintained a hostile work environment for the plaintiff and other women employees.³²

One principle guided the use of this research: in attempting to understand, explain, or predict conduct, attention to the contexts in which events occur is important. The beauty of court-made law, albeit expensive, is its ability to examine specific facts in particular contexts. On this note, however, the provocative observations by political scientist Kim Lane Scheppele are instructive. Scheppele points out that it is not only the substantive content of the law and the potential for bias in the thought processes of decision makers that make law hostile to women. Bias also rests in the time-honored standards for trial truth-testing. Scheppele observes that the law values as true stories of events that are promptly conveyed, consistent, and unchanged.³³ But what about the female token in the nontraditional workplace who may hesitate to complain because she does not want to subject herself to greater scrutiny? What about a woman's experience of sexual abuse? Cultural and psychological effects of sex-based harm may discourage the naming of its cause. Accordingly, when a woman does come forward about sexual abuse that occurred in a family or friendship, at work or on the street, the manner in which she comes forward may not comport with the requirements of consistency and promptness privileged in legal fact-finding. She may at first have tried to dismiss the abuse as unimportant, to forgive the abuser, or even to claim it was her own fault, only to discover upon reflection that her initial reaction was obviously wrong. Legal truth-finding techniques favor a conclusion that she is a liar for her carefully considered insight.

This problem has demanded attention in *Robinson* and cases like it. In *Robinson*, we offered expert and factual evidence to explain, for example, how different women may react to sex-based harassment, how different women may have been harmed, and why they failed to complain.³⁴ Similarly, we used expert testimony to explain how to prevent harassment and its harm.³⁵ In using these strategies, we may be able to eliminate bias without resort to special legal standards re-

32. *Robinson*, 760 F. Supp. at 1491.

33. Kim Lane Scheppele, *Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, (1992).

34. *Robinson*, 760 F. Supp. at 1505-07. 4 Robinson Trial Transcript, *supra* note 26, at 84-171 (testimony of expert K.C. Wagner).

35. *Robinson*, 760 F. Supp. at 1518-19.

lating to gender that may well introduce more bias than they eliminate.³⁶ Solutions in one case may, in addition, provide building blocks for success in other instances of legal problem-solving.

36. For an example drawn from recent work on battered women of a discussion of the pitfalls of, and the misconceptions behind, special standards for women, see Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

